IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

ALGOMA PLYWOOD AND VENEER CO.,
Petitioner,
vs.
WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.
No. 216.

BRIEF ON BEHALF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., AMICUS CURIAE.

ALFRED G. GOLDBERG,
DAVID PREVIANT,
SAUL COOPER,
511 Warner Theatre Building,
212 West Wisconsin Avenue,
Milwaukee 3, Wisconsin,
Attorneys for United Brotherhood of Carpenters and Joiners of America, A. F. of L.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Table of Cases Cited.

Statutes Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

ALGOMA PLYWOOD AND VENEER CO., Petitioner, vs. WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent.	No. 216.

BRIEF ON BEHALF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., AMICUS CURIAE.

Local 1521 of the United Brotherhood of Carpenters & Joiners of America, A. F. of L., hereinafter called the "Union," was the labor-union party to the contract with the Algoma Plywood & Veneer Company, petitioner herein, which contract gave rise to the proceedings which are now before this court. The Union intervened as a defendant in the proceedings before the Wisconsin Employment Relations Board and appealed to the Circuit Court from the adverse ruling of the state board.

The United Brotherhood of Carpenters & Joiners of America, A. F. of L., now files this brief amicus curiae because it believes the order of the Wisconsin Employment

Relations Board, which was enforced by the Circuit Court and affirmed by the Wisconsin Supreme Court is contrary to law.

SCOPE OF BRIEF.

This brief will discuss the question of the authority of the state board, first, to entertain jurisdiction at all over the subject matter and the parties; secondly, to enter an order which is inconsistent with the federal law, policy, and regulations.

This brief is directed to the propositions that the state board cannot take jurisdiction in the first instance, and in the alternative, if it does have the power, it cannot enter and enforce an order which is in conflict with the federal law.

ARGUMENT.

I.

The Restrained Activity Is One Which Is Protected Under the National Labor Relations Act.

At the time of the dismissal of the employee in the instant case, Section 8 (3) of the National Labor Relations Act (49 Stat. 449, 29 U. S. Code, Par. 151 et seq.) provided that:

> "It shall be an unfair labor practice for an employer * * * (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, * * * or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."

The union was certified as the exclusive bargaining representative of the employees of the Algoma Plywood & Veneer Co. in 1942 (R. 19) for the same bargaining unit covered by the instant agreement. The employee was discharged pursuant to a union security contract which provided for maintenance of membership.

This provision had been inserted in the 1943 contract and subsequent contracts upon the recommendation of a

federal conciliator in accordance with the policy of the National War Labor Board.

What the State of Wisconsin has termed an unfair labor practice is the discharge of an employee who did not maintain his membership in the labor organization because he failed to pay his dues, as required by the contract existing between the parties. The Board drew its authority from 111.06 (1) (c), which provides:

> "It shall be an unfair labor practice for an employer individually or in concert with others:
>
> "(c) 1. To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; provide that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employes in a collective bargaining unit, where at least two-thirds of such employes voting (provided such two-thirds of the employes also constitute at least a majority of the employes in such collective bargaining unit) shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. * * *"

It is submitted that this contract is permitted and protected under the then provisions of Section 8 (3) of the National Labor Relations Act. See **National Licorice Company v. National Labor Relations Board**, 309 U. S. 350, 360; **Peninsular & Occidental Steamship Company v. National Labor Relations Board et al.**, 98 Fed. (2nd) 411, 414 (cert. den. 305 U. S. 653); **National Labor Relations Board v. Reed & Prince Manufacturing Co.**, 118 Fed. (2nd) 874, 883 (cert. den. 313 U. S. 595).

II.

The Wisconsin Board and Courts Had No Jurisdiction and Therefore the Order and Judgment Are Void Under Article I, Section 8 and Article VI of the Constitution of the United States.

The question of jurisdiction was raised before each tribunal on the authority of **Bethlehem Steel Co. v. New York State Labor Relations Board,** 330 U. S. 767, and each, the Board, the Circuit Court, and Supreme Court of the State of Wisconsin, rejected it. The Supreme Court held that (R. 63), "The **Bethlehem** case has limited the case by case doctrine commonly attributed to the Wisconsin decisions, only to the extent of holding that where there has been a valid general exercise of its administrative power by the National Labor Relations Board neither repugnant provisions of the state law nor repugnant policies of the State Board are effective to defeat the purpose and policy of the exercise."

Congress by Enacting the National Labor Relations Act Preempted the Field of Employer Unfair Labor Practices.

Section 7 of the National Labor Relations Act, supra, in the form in which it appeared at the time of the discharge provided that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[1]

[1] Subsequently, this section was amended to read "and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)." Public Law 101, 80th Congress, June 23, 1947, hereinafter referred to as the Labor Management Relations Act. This amending language, however, is not applicable to the instant case.

The federal law also provided in Section 8 (1) that "it shall be an unfair labor practice for an employer, (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

Union security contracts are the result of collective bargaining within the meaning of section 7 and entering into such a contract under the conditions of section 8 (3) was specifically exempt from the unfair labor practice provisions of the law. These expressions of Congress indicate an intent to preempt the field of labor disputes dealing with unfair labor practices of employers in commerce.

This court discussed pre-emption in the field of labor disputes in the case of **Allen Bradley Local 1111 v. Wisconsin Employment Relations Board**, 315 U. S. 740. It found in that case that there was no pre-emption because "Congress designedly left open an area for state control," and the control by Congress was not so pervasive as to prevent Wisconsin from supplementing federal regulation. There, however, this court was dealing with employee unfair labor practices about which the federal law was silent.

But in the **Bethlehem** case, supra, the court said that "when Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own." **Texas & Pacific Railway Co. v. Rigsby**, 241 U. S. 33, 41; **Hill v. Florida**, 325 U. S. 538. If what Congress has enacted into the National Labor Relations Act as it pertains to unfair labor practices of employers is within the language of this rule, we may conclude that it intended pre-emption.

In the National Labor Relations Act, Congress declared the policy of the United States as follows:

> "Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and by restoring equality of bargaining power between employers and employees.
>
> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, or the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

To implement this policy the provisions of Section 8 and Section 10 were drafted into the law. Section 8 defined unfair labor practices on the part of employers, and imposed certain limitations on their activities, while section 10 (a) of the federal law (at the time of the entry of the order) provided

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has

been or may be established by agreement, code, law or otherwise."

Section 10 (a) clearly indicates that "Congress has intended no regulation except its own."

This intent to vest exclusive power in the National Board has recently been confirmed by the insertion of section 10 (a) in the Labor Management Relations Act of 1947. That section now provides:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation, except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial Statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act, or has received a construction inconsistent therewith."

If it was the congressional desire not to preempt the power of the board in amended section 10 (a) would not have been emphasized by the words "shall not be affected by any other means of adjustment," and it would not have been further delineated by the authority to cede jurisdiction except in the specific industries of mining, manufacturing, communications, and transportation.

In so amending the law, Congress took heed of Justice Frankfurter's analysis of the majority opinion in the **Bethlehem** case, which he said meant that it was beyond the power of the National Board in its discretion to agree with state agencies to divide jurisdiction over disputes, which could not be covered by the National Board alone. Congress now made it clear that there was an area where jurisdiction could be ceded.

The **Bethlehem** case involved the right of the New York State Labor Relations Board to conduct an election and to certify a bargaining representative among employees of an employer over which the National Labor Relations Board clearly had jurisdiction, although it had taken no positive action in the particular case. Hence, Sections 9 (b) and 9 (c) of the National Labor Relations Act were involved and not Section 10 (a). No words of sole power to handle the representation cases appeared in the National Labor Relations Act or now appear in the Labor Management Relations Act. It thus seems reasonable to assume that if, as Justice Frankfurter supposed, in his dissenting opinion in the **Bethlehem** case, the decision of the court meant that the National Board's jurisdiction under the National Labor Relations Act was exclusive in representation cases, then, a fortiori, the federal board's jurisdiction was exclusive in unfair labor practice cases since Section 10 (a) did include an express provision to that effect.

And even if there were not the express exclusive power contained in Section 10 (a) of the federal act, exclusion of state action in this case is nevertheless demonstrated under the test set forth in the **Bethlehem** Case since here (p. 775)

> "* * * both governments have laid hold of the same relationship for regulation, and it involves the same

employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this kind of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter * * *. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. * * * But the power to decide a matter can hardly be made dependent upon the way it is decided. * * * We do not think that a case by case test of federal supremacy is permissible here."

Wisconsin and the federal government are each seeking to regulate differently the unfair labor practices of employers in matters affecting and involving interstate commerce. Each has created an administrative agency with a discretion in applying the plan of regulation. Under the federal act certain limits are placed upon the type of relief which may be granted [Section 10 (c)]. Wider discretion, however, is vested in the Wisconsin Board [Section 111.07 (4), Wisconsin Statutes]. There are differences in the definition of terms in the National Act, as compared with the Wisconsin Act, e. g., "employee" and "labor dispute." There is a difference between the union security provisions of Section 8 (3) of the federal law and Section 111.06 (1) (c) and 111.02 (9), Wisconsin Statutes. A discrepancy exists in the pattern of employer unfair labor practices as set forth in Section 8 of the federal act as compared with Section 111.06 (1), Wisconsin Statutes. To permit concurrent jurisdiction under such circumstances would destroy the uniform plan of regulation emphasized by Congress.

In the **Bethlehem** case, the particular question of representation therein involved had not been presented to the

National Board. Nevertheless, this Court held that the State could not have concurrent jurisdiction over the same subject matter. In the instant case, not only was the union certified by the National Labor Relations Board in 1942, but the National Board had previously taken jurisdiction of an unfair labor practice complaint against this employer. **In re: Algoma Plywood & Veneer Co. and Local 1521, United Brotherhood of Carpenters & Joiners of America (A. F. of L.)**, 26 N. L. R. B. 975. Enforcement denied, **N. L. R. B. v. Algoma Plywood & Veneer Company**, 121 Fed. (2nd) 602 (1941). Such exercise of power constituted an assumption of jurisdiction and was an assertion of "control of their labor relations in general." This general control was sufficient to oust the state of jurisdiction. See **Bethlehem Steel** Case at p. 776.

There is no question but that unfair labor practices under Section 8 (3) of the National Labor Relations Act have been ruled on frequently by the National Board, establishing precedent, and this leaves no possible room for a construction permitting concurrent jurisdiction.

Further indicative of the intention of Congress at the time of the discharge in the instant case is the fact that not until the National Labor Relations Act was amended was there anything written into the Federal Law which gave the state the authority to prohibit the execution or application of agreements requiring membership in a labor organization as a condition of employment. It can reasonably be concluded that because the Congress felt that the state did not have this right under the old law, such right was incorporated in Section 14 (b) of the Labor Management Relations Act of 1947.

The opinion of the Wisconsin Supreme Court refers to Congressional Committee Reports (R. 65) as they apply to an interpretation of Section 8 (3) of the National Labor

Relations Act. In an annotation appearing at 70 A. L. R. 5, there is extensive treatment of the weight to be given to committee reports. It is said there that such reports are to be considered only where the statute is ambiguous or obscure. Here, we have neither. Also pertinent is the holding of this court in **Downes v. Bidwell**, 182 U. S. 244, 254, in which it is said that "The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts." See also **MacKenzie v. Hare**, 239 U. S. 299.

Recently two other state supreme courts have interpreted their own state Labor Relations Acts in the light of the **Bethlehem** case. These are the states of Pennsylvania and New Hampshire. In both cases the State Supreme Court held that Congress had pre-empted the field by enacting the National Labor Relations Act, and that the State Board no longer had any jurisdiction. See **Pittsburgh Railways Company Substation Operators and Maintenance Employees Case**, 357 Pa. 379, 54 At. (2nd) 891, and **International Union of Teamsters, etc., v. Riley**, 59 At. (2nd) 476 (N. H., 1948). The Pennsylvania case was a representation case, while the New Hampshire case involved an unfair labor practice similar to that before this court. Wisconsin, alone, clings to jurisdiction in industries affecting interstate commerce.

It is submitted that the situation which was contemplated by the **Allen-Bradley** case, supra, has now come into being, and the circumstances set forth in the **Bethlehem** case, supra, as evidencing the desires of Congress to exclude state action are clear and certain. **Gerry v. Superior Court**, 194 Pac. (2nd) 689 (Calif., 1948).

Under the National Labor Relations Act, then, the Congress had engaged in a comprehensive system of regulation of the activities of employers, such regulation invoking the processes of the National Labor Relations Board. By its declaration of policy, the establishment of unfair labor practices, and Section 10 (a), Congress made clear its intention to preempt the field.

III.

Where Congress Has Regulated a Subject Matter Permitting Concurrent State Regulation, the State May Act Only in a Manner Consistent With the Congressional Action.

In the first part of this brief we have enumerated the various aspects of the federal law which indicate the Congressional intent to act exclusively in the field of labor relations in those areas over which the federal Congress has imposed regulation. But if it should be construed that there was no federal preemption and the state retains concurrent jurisdiction over labor disputes, nevertheless, the state may not act in a manner inconsistent with the regulation of Congress over a particular relationship.

This court said in the **Allen-Bradley** case, supra, that since the area of employee activities was unregulated, Congress was indifferent to what the individual may do under the compulsion of the state, and since the state law covered the area of labor relations not dealt with by the federal act, the order of the state agency was not in conflict with the federal act.

It said "* * * If the order of the State Board affected the status of the employees or if it caused a forfeiture of collective bargaining rights, a distinctly different question

would arise. * * * It has not been shown that any employee was deprived of rights protected or granted by the federal act or that the status of any of them under the federal act was impaired" (**Allen-Bradley** case, supra, p. 751).

The contract in question is the direct result of collective bargaining which was engaged in pursuant to Section 7 of the national law, and is the embodiment of collective bargaining rights, specifically exempt from limitation by section 8 (3). To enforce the Board's order to cease and desist from effectuating the contract would foreclose the employer and the union from the right to bargain for a maintenance of membership or other union security provision. This court has declared that such provisions are "frequent subjects of negotiation between employers and employees." **National Licorice Co. v. National Labor Relations Board**, supra; **Consolidated Edison Company v. National Labor Relations Board**, 305 U. S. 236; **National Labor Relations Board v. Sands Manufacturing Company**, 306 U. S. 332 at 342. Denial of the right to negotiate for a union security provision would cause a forfeiture of collective bargaining rights protected by section 7, which are precisely the kind of rights this court said it would protect in the **Allen-Bradley** case.

We have shown that the instant case does deal with an area over which the federal Congress has exerted its power and that the state policy and rules do conflict with federal law. In order for the parties to submit and comply with the state rule and judgment it is clear they would be deprived of benefits that all similar employers and employees outside the state may enjoy, and consequently be at a competitive disadvantage with those persons outside the state. They must necessarily forfeit a right assured them by the National Labor Relations Act.

Section 111.06 (1) (c) of the Wisconsin Statutes provides that it is an unfair labor practice for an employer to encourage or discourage membership in a labor organization, by discrimination in regard to hiring, tenure or other terms or conditions of employment; "provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit, where at least two-thirds of such employees voting (provided such two-thirds of the employees also constitute at least a majority of the employees in such collective bargaining unit) shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the Board. • • •"

Section 8 (3) of the National Labor Relations Act provides for a similar unfair labor practice by the employer with a proviso which allows a union security agreement to be made; the only condition being that the agreement be made with the authorized representative of the employees.

Comparing the two sections, we note that they both make encouragement or discouragement by discrimination an unfair labor practice, but there is a two-fold conflict between them: first, the proviso in the state law requires a vote with a two-thirds majority of the employees voting, to legalize the contract, and second, it is essential that such two-thirds majority also constitutes a majority of the eligible voters in the unit to validate the agreement. Contra, the federal law requires no sanctioning vote at all, the status of bargaining representative of a majority of the employers being sufficient. This approving vote required by the state deprives employers and employees in industries affecting commerce of the freedom of bargaining which they are granted by the federal law.

The cases are all in accord that where there is conflict between the state act and the federal act so as to impair federal rights, the state may not regulate a labor dispute of an employer whose business affects commerce. **Allen-Bradley Local v. Wisconsin Employment Relations Board**, supra, at page 751; **International Union etc. v. Wisconsin Employment Relations Board**, 245 Wis. 417 at 425; **Hill v. Florida**, 325 U. S. 538.

In the **Hill** case, like the instant case, the situation which this court says was not present in the **Allen-Bradley** case had come into being namely, the situation where the full freedom of collective bargaining, the object to be accomplished by the National Labor Relations Act, was restricted by the state law. There, a business agent had to be licensed by the state before he could represent employees in collective bargaining. Here the required vote under the auspices of the state board is tantamount to a license. In applying the reasoning of the **Hill** case to the situation at hand, the full freedom of collective bargaining to enter into this kind of contract herein executed, which Congress envisioned as essential to protect the free flow of commerce among the states would be "shrunk to a greatly limited freedom" by the state of Wisconsin.

The requirement of a licensing vote, pursuant to the Wisconsin Law, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." **Hines v. Davidowitz**, 312 U. S. 52, at 67; **Napier v. Atlantic C. L. R. Co.**, 272 U. S. 605.

Should this court construe the federal act as leaving room for the Wisconsin Legislature to act in this field of regulation, then it is submitted that the State of Wisconsin had no power to act in the manner that it did, repugnant to the federal law.

CONCLUSION.

It is respectfully submitted that the Wisconsin Statute and the order issued by the Wisconsin Employment Relations Board, pursuant to alleged authority vested in it by the statute, cause a forfeiture of rights which have been safeguarded by the federal law. The National Board, having exclusive jurisdiction over the relations of the parties, as proclaimed by the federal law, the state should not be permitted to impair, dilute, or qualify in any respect the rights granted by the federal law. This court has spoken quite clearly and has indicated in the **Bethlehem Steel** case that the federal power is paramount in the field of labor relations affecting interstate commerce. Despite this pronouncement, the State of Wisconsin has in several instances acted to defeat the declarations of this court.

In its opinion in the instant case, the Wisconsin Supreme Court has said that if the Board is to be in effect abolished, that abolition will have to be accomplished by the Supreme Court of the United States. We are not here seeking abolishment of the Wisconsin Board or the regulation. That board has jurisdiction over matters which have not been regulated federally. Denial of jurisdiction in federal matters comes not from the desires of any court or person, but flows from the superior power vested in the Congress by the Constitution of the United States. It is respectfully submitted that reversal of the state court judgment is required so that the flow of commerce, as declared by the federal law in its paramount right can remain completely free.

Respectfully submitted,

ALFRED G. GOLDBERG,
DAVID PREVIANT,
SAUL COOPER,
Attorneys for United Brotherhood of Carpenters and Joiners of America, A. F. of L.